INDEX

CITATIONS

Cases—Continued

In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 93

UNITED STATES OF AMERICA, PETITIONER

v.

DANIEL J. KOENIG

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (R. 17–29) is reported at 290 F. 2d 166.

JURISDICTION

The judgment of the court of appeals was entered on April 12, 1961 (R. 30). The petition for a writ of certiorari was filed on May 17, 1961, and was granted on October 9, 1961 (R. 30). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTION PRESENTED

Petitioner moved for the return and suppression of property prior to indictment in the district of seizure which was different from the district in which the indictment was subsequently returned and will be

tried. Petitioner's right to most of the property depending on the outcome of the criminal trial and his interest in the other property was insubstantial. The question presented is whether the proceedings upon the motion were independent of the criminal case and therefore the order of the district court suppressing the evidence was an appealable final order.

STATUTE AND RULE INVOLVED

Section 1291 of Title 28 U.S.C. provides:

> The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court.

Rule 41(e), F.R. Crim. P., provides:

> *Motion for Return of Property and to Suppress Evidence.*
>
> A person aggrieved by an unlawful search and seizure may move the district court for the district in which the property was seized for the return of the property and to suppress for the use as evidence anything so obtained on the ground that (1) the property was illegally seized without warrant, or (2) the warrant is insufficient on its face, or (3) the property seized is not that described in the warrant, or (4) there was not probable cause for believing the existence of the grounds on which the warrant was issued, or (5) the warrant was illegally executed. The judge shall receive evi-

dence on any issue of fact necessary to the decision of the motion. If the motion is granted the property shall be restored unless otherwise subject to lawful detention and it shall not be admissible in evidence at any hearing or trial. The motion to suppress evidence may also be made in the district where the trial is to be had. The motion shall be made before trial or hearing unless opportunity therefor did not exist or the defendant was not aware of the grounds for the motion, but the court in its discretion may entertain the motion at the trial or hearing.

STATEMENT

Respondent was arrested by F.B.I. agents on September 29, 1959, in a rented house in Miami, Florida, which he occupied with his family (R. 1–2; Tr.[1] 60, 205, 283), and was charged with robbery on August 22, 1959, of a federally-insured bank in Yorkville, Ohio (R. 4, 7–8; Tr. 49, 65, 275–277). The arrest was based both upon a warrant of arrest issued in the Southern District of Ohio (later found to be based on an insufficient complaint) and information known to the arresting officers (later found to constitute probable cause). As an incident of the arrest, respondent's house was searched, and large sums of money, a .45-caliber Colt automatic pistol, and certain other items were seized (R. 14; Tr. 75–77).

On October 9, 1959, a final hearing was held before the United States Commissioner of the Miami Division of the Southern District of Florida on the Ohio com-

[1] "Tr." refers to the transcript in the court of appeals which has been filed with the Clerk of this Court.

plaint, and on October 14, the commissioner recommended that a warrant of removal be issued (R. 4–5). On October 16, an indictment was returned against respondent in the District Court for the Southern District of Ohio (R. 9).

In the meantime, on October 12, respondent filed a "Motion to Suppress Evidence and Return Property" in the District Court for the Southern District of Florida (R. 1–3). On December 18, after three hearings on earlier dates (Tr. 43, 116, 267), the district court granted the motion to suppress but denied the motion for the return of property. The court made no findings of fact or conclusions of law, but found merely that "the agents making the arrest without warrant had probable cause therefor but that the said search was unreasonable and in violation of the Fourth Amendment to the Constitution of the United States" (R. 15–16). The government filed a notice of appeal to the court of appeals on January 18, 1960 (R. 16), and on April 12, 1961, that court dismissed the appeal for lack of jurisdiction on the ground that it was an interlocutory order in a criminal case (R. 30).

SUMMARY OF ARGUMENT

The issue in this case is the appealability of an order granting respondent's motion to suppress which was filed in the district where the property was seized, not the district where the indictment was subsequently returned. In our petition for certiorari, we contended that the decision of the court of appeals dismissing an appeal from the order was erroneous. On recon-

sideration, however, we have concluded that the contentions in our petition were either erroneous or not conclusive; we now believe that the court below was correct and the order is not appealable.

I

The order in the instant case, under the principles we suggest in *Di Bella* v. *United States,* No. 21, this Term, would not have been appealable if it had been made in the district of trial. The major property involved is approximately 14,000 dollars which the government alleges and intends to prove at the trial were stolen. Since respondent's right to this property depends on the outcome of the criminal case, his motion seeking suppression and return of the property is in actuality merely a motion to suppress. As such, it is a part of the criminal case and is not appealable. Respondent's property interest in the other property seized is so insubstantial that his motion for the return of this property likewise does not constitute an independent proceeding determining the right to valuable property. In short, under the standards we suggest in *Di Bella,* respondent's motion was not independent of the criminal case and the court's order was not final and not appealable.

On the other hand, if we are wrong in our contentions in *Di Bella* and a motion filed before indictment in the district of seizure is independent of the criminal case, then, *a fortiori,* a motion filed before indictment in another district is independent and an order deciding the motion is final and appealable.

II

When the motion is brought before indictment in the district of seizure, as here, the same considerations govern appealability as apply to an identical order on a motion brought before indictment in the district of trial (the situation involved in *Di Bella*).

A. The appealability of an order depends upon whether it is "an independent proceeding or merely a step in the criminal case"; and this question depends in turn upon the "essential character [of the motion] and the circumstances under which it is made." *Carroll* v. *United States*, 354 U.S. 394, 404, note 17. The "essential character and the circumstances" are, first, the real purpose for which the motion was brought and, second, the kind of property involved. These factors remain the same whether the motion is brought in the district of trial or in the district of seizure.

There is no practical or legal bar to treating motions made in one district as part of a criminal case in another, for all district courts are part of a single federal judicial system and the same basic substantive and procedural law applies throughout. The integral relationship between motions made in one district and a criminal case in another is shown by the fact that motions under Rule 41(e) are often transferred from the district of seizure to the district of trial. It is also shown by the fact that all, or almost all, motions brought before indictment in the district of trial were brought there because it was the district of seizure. Rule 41(e) allows motions to be brought in the dis-

trict of seizure or of trial, and the latter is not determined until the indictment is returned. It would certainly be anomalous to apply the principles we suggest in *Di Bella* to a motion in the district of seizure merely because it becomes the district of trial, but not to identical motions in the district of seizure where the indictment is returned in another district.

B. This Court has noted in one-line descriptions of the existing law in *Cogen* v. *United States*, 278 U.S. 221, 225, and *Carroll* v. *United States, supra*, 354 U.S. at 403–404, where these issues were not before it, that orders brought before indictment in the district of trial and all motions brought other than in the district of trial are appealable. But these summary statements are based on decisions which do not, on examination, support them. Thus, the statement that an order brought in a district other than that of trial is appealable rests solely upon *Dier* v. *Banton*, 262 U.S. 147, which involved two separate sovereignties, and not merely, as here, two different courts within the same judicial system. While an order to suppress in one federal court can be part of a criminal case in another district since it is part of the same judicial system, an order in a federal court is necessarily independent and final with regard to a criminal case in a state court. Moreover, *Dier* v. *Banton* was decided at a time when the courts were generous in allowing appeals partly because of the desirability of settling the new procedures on motions to suppress, partly because there were doubts whether the effect of orders made upon such motions might not be *res judicata*, and

partly because there was less awareness than there is today of the problem of appealability.

The principle disfavoring fragmentary and nonterminal appeals applies to the situation here with the same force as in *Di Bella*. In both types of situations appeals will cause delay in the trial. Recent decisions of this Court indicate that such mechanical tests of appealability as the time of the motion or the place where it is brought should not be applied. *Carroll* v. *United States*, *supra*, 354 U.S. at 404; *United States* v. *Wallace Co.*, 336 U.S. 793, 802.

III

If the admissibility of the property as evidence is *res judicata* in the district of trial because of the order in the district of seizure—in short, if the trial judge were bound by the order—the order would be appealable. Under *Cohen* v. *Beneficial Loan Corp.*, 337 U.S. 541, and *Swift & Co.* v. *Compania Caribe*, 339 U.S. 684, an order is independently appealable if it finally adjudicates an important right of a litigant and is not an integral part of the main litigation. However, when an order under Rule 41(e) is not final, it is not *res judicata*. We believe the latter rule to govern here.

Rule 41(e) and the prevailing judicial decisions show that the order below was not absolutely binding on the trial court. In *Gouled* v. *United States*, 255 U.S. 298, 312–313, this Court held that an order deciding a pretrial motion is subject to reconsideration by the trial court. The lower courts uniformly have held that an order on a pretrial motion in the district of trial can be reconsidered by the trial court

(though there is some dispute as to the scope of the reconsideration). Thus, it is clear that interlocutory orders on pretrial motions in the district of trial are not *res judicata*; indeed, since the cases do not discuss whether the order is final or not, it appears that even final pretrial orders are not absolutely binding on the trial court. Since, as we have seen, orders in the district of seizure have the same relationship to the criminal case as orders in the district of trial, the same rule as to *res judicata* should apply to both.

The only possible basis for differentiating between the *res judicata* effect of orders in the district of seizure and in the district of trial is Rule 41(e). That rule provides that if a motion to suppress in the district of seizure is granted, the property "shall not be admissible in evidence at any hearing or trial." We do not think that this provision makes orders granting motions to suppress *res judicata*, while orders denying such motions are not. Normally *res judicata* applies equally to both parties. Otherwise, only the government would be bound and only the government could appeal, while the defendant could not. A subsequent provision in Rule 41(e) allows trial courts in their discretion to entertain motions to suppress. This provision has been interpreted by the courts to allow consideration of motions under Rule 41(e) not only where no motion has been made before trial but also where such motions have been made and decided. It shows, we think, that pretrial orders do not have a *res judicata* effect.

Moreover, the argument showing that an order on the motion to suppress is not sufficiently final to be

appealable also goes far to demonstrate that the order is not *res judicata*. For "[o]rdinarily the requirement of finality of judgment as a basis for appellate proceedings is the same as that of finality as a basis for the application of the rules of *res judicata*." Restatement of Judgments, Sec. 41, Comment *a*. This Court specifically applied the same standard in determining whether an order was *res judicata* as it would have if the issue had been whether the order was appealable. *United States* v. *Wallace Co., supra*. If there are any differences between the degree of finality required for appeal and the degree required for application of the doctrine of *res judicata*, the greater finality is required in the latter case. Therefore, if the order here is not appealable, it is necessarily not *res judicata*.

ARGUMENT

INTRODUCTION

The issue in this case is the appealability of an order granting respondent's motion to suppress, under Rule 41(e) of the Federal Rules of Criminal Procedure, entered in the Southern District of Florida where the property was seized. Prior to the filing of the motion, a complaint, which was subsequently determined to be invalid, had been filed against petitioner in the Southern District of Ohio. Subsequent to the filing of the motion, but before the order was entered, an indictment was filed in the Southern District of Ohio. The court of appeals below held that, despite the fact that the order was entered in a district other than the district of the indictment, it was not appealable.

In our petition for certiorari in this case, we took the position that the decision of the court of appeals was erroneous. We argued that all orders deciding motions to suppress in districts other than the district of the indictment were appealable. On reconsideration of our position, however, in connection with our presentation in *Di Bella* v. *United States*, No. 21, this Term—which involves the closely related issue of the appealability of orders on motions to suppress filed by the prospective defendant prior to the return of an indictment in that same district—we reached a different conclusion. We now believe that the court of appeals below correctly held that the order of the district court was not appealable.

This does not mean that the writ of certiorari should be dismissed. The interest of the government in these cases is threefold:

1. A clear-cut, easily administerable rule should be established which will at the same time facilitate the expeditious trial of criminal cases consistent with fairness to the defendant. Unnecessary technical or mechanical distinctions should therefore be eschewed. We have concluded, for reasons stated below, that this interest can best be secured by applying here in *Koenig* the same principles as govern *Di Bella* and holding that the order suppressing the evidence is not appealable even though it was entered in a different district than the district in which the trial will take place.

2. Rules of procedure should be uniformly applied. If Di Bella can maintain an appeal, contrary to our submission, then the order is also appealable against

Koenig in the present case; for every distinguishing circumstance argues for giving the order greater finality when, as in the present case, it is made by a court in which the defendant will not be tried. So long as the *Di Bella* case is *sub judice*, the principle of equal treatment prevents disposing of the present case simply by dismissing the writ of certiorari.

3. The finality of an order upon a motion to suppress evidence should be no greater for the purposes of applying the doctrine of *res judicata* than it is for the purposes of appeal. If the order on the motion to suppress is conclusive against the government upon the admissibility of the evidence, and upon a defendant when the order goes against him, fairness to the losing party requires a right of appeal. If the order is *res judicata*, the proceeding cannot be part of the criminal case and the rule against criminal appeals by the government would not apply.

Because of the link between appealability and *res judicata* we would adhere to the position taken in the petition for certiorari and urge that the order suppressing the evidence was appealable if we thought that the order was *res judicata* under Rule 41(e). Indeed, we submit even now that, if the Court concludes that the order has that effect, the appeal should be allowed and the judgment below should be reversed. Upon reexamination, however, we are satisfied for reasons stated at pp. 31–38 that orders granting or denying motions to suppress do not conclusively fix the rights of the parties even when made in a court other than the court in which the criminal case will be tried. In our view, such

an order may be entitled to weight upon principles of comity but it is not *res judicata*.

Accordingly, we submit in Point I of this brief that under the principles suggested in *Di Bella* the order of the district court would not be appealable in this case if the motion to suppress and resulting order had been made in the district in which the indictment was returned and the trial would be held. In Point II we show that the standard of finality should be the same when, as here, the motion is made in another district; for the purpose and effect of a motion to suppress are the same regardless of the court in which the motion is made. The acceptance of this argument would call for rejecting the dicta in two earlier decisions asserting that an order upon a motion to suppress is appealable when made outside the district of trial but, as we will show, those dicta are neither supported by the precedents cited nor in keeping with the analysis of the problem elsewhere in the opinions of the Court. Finally, in Point III we develop more fully our reasons for concluding that the order does not render the admissibility of the evidence *res judicata*.

I

THE ORDER OF THE DISTRICT COURT WOULD NOT HAVE BEEN APPEALABLE IF IT HAD BEEN ENTERED IN THE DISTRICT OF INDICTMENT AND TRIAL

In this case, the motion and order of suppression were not made in the district of the indictment. Nevertheless, we submit that the initial question is whether a similar order based on a similar motion

in the district of indictment would have been appealable. If it would have been, *a fortiori* the government was entitled to appeal the order in this case. For the fact that the motion and order are made in a different district from the district of indictment and trial adds, if anything, an additional degree of finality and separateness from the criminal case. If, on the other hand, a similar order in the district of the criminal case would not be appealable, the basic issue here is whether the standard of appealability should be the same for orders in the district of seizure and the district of indictment. We will contend below (pp. 19–25) that the same standard should be applied because the orders have an equivalent effect.

In our brief in *Di Bella* v. *United States,* No. 21, pp. 21–52, we contend that an order granting or denying a motion under Rule 41(e) is not final and appealable merely because the motion was made before the indictment was returned. In our view the appealability of an order deciding a motion to suppress made before indictment depends upon whether, considering the circumstances, it is simply a procedural phase of the criminal case. In *Di Bella,* the petitioner asked only for the suppression of evidence, not for the return of property. Since the only purpose of the motion was to prevent the introduction of evidence in the criminal case, the order denying the motion was not final and therefore not appealable. On the other hand, when the defendant asks for the return of the seized items and he has an unchallenged and substantial property interest in those items, an

order deciding a motion made before indictment is not just a procedural step in the criminal case. Instead, it involves the independent right to valuable property, and the order determining this right is appealable.

Of course, a defendant has no property interest in contraband or stolen property since he is not entitled to its return even if it was illegally seized. Therefore, an order on a motion seeking return of contraband or stolen property is the equivalent of an order on a motion which seeks merely to suppress evidence, and is not appealable. Similarly, we suggest that where the issue whether the materials are or are not contraband—or stolen—depends on the outcome of the criminal case, the order should likewise not be appealable, at least if it is decided after the indictment is returned. The defendant is not entitled to the return of the property until his right to the property has been litigated in the criminal case—which presumably will be reasonably soon after the indictment has been returned. In these circumstances, the plea for return of the property does not make the motion independent of the criminal case.

Here, a large amount of property was seized: an attaché case (containing 13,190 dollars, a pistol, shoulder holster, and box of ammunition), a masquerade makeup kit, a straw hat, three pairs of slacks, a box (containing forty coin wrappers and miscellaneous notes and receipts), a sport shirt, a calendar sheet for August 1959, 543 one-dollar bills, a ceramic cat (containing 340 dollars), and two rolls

620332—61——3

of pennies.[1] Since respondent asked for the return of this property, the order on his motion would have been appealable *if* he had had an unchallenged right to its return on a finding that the property had been illegally seized. The respondent, however, did not have an unchallenged right to the bulk of this property. The government contends and intends to prove at the criminal trial that the money seized from respondent is part of over 30,000 dollars stolen by respondent from a federally-insured bank and is therefore not his property at all. Even assuming that the money was illegally seized by the government, respondent was not entitled to its return before trial, and accordingly the district court did not order its return. Under the principles suggested by the government in *Di Bella*, the motion, insofar as it related to the money seized, was an integral part of the criminal case. This is especially clear here, since the order was not made until after the criminal case had been begun by the return of the indictment in Ohio.

We do not think that respondent had a substantial enough interest in the other property seized (besides the money) to make the motion seeking return of the property, as well as its suppression as evidence, an independent proceeding—particularly in view of the fact that the order of the district court was entered after the indictment was returned. If his motion had been denied, respondent would have had the oppor-

[1] In addition, the FBI agents seized two pairs of sunglasses and a coin wrapper, but the government did not appeal the suppression of these items.

tunity to obtain appellate review of the denial of the return of his property, after he was tried and convicted, on appeal. If he was not convicted or the government never put him to trial, the property could then be returned. The result of not allowing an immediate appeal (in these circumstances) from the order denying return would be only to deprive petitioner of the use of his property for a period of time. Where the defendant's property interest is so insubstantial—as we believe is the case with the property, other than the money, involved here—we do not think that his plea for immediate return of the property makes the order the culmination of an independent proceeding justifying appeal.[3]

If the defendant could not appeal from the denial of his motion to suppress, we believe that the government is likewise barred from appealing the grant of a motion. It seems clear that the government and the defendant should have the same right of appeal under a general statute authorizing "appeals from all final decisions" of the district courts. 28 U.S.C. 1291, *supra*, p. 2. If an order denying a motion to suppress is not final, then an order granting a motion is likewise not final. The issue is whether the motion and the proceeding to decide it are part of the criminal case—*i.e.*, whether the

[3] In our brief in *Di Bella*, pp. 32, 51, we suggest that $20,100 is a substantial property interest, while documents or copies of documents not needed by the defendant are not. The items here (if the money is excluded) obviously fall somewhere in between these two examples, and in our view lie very close to the documents or copies.

motion concerns the defendant's right to obtain return of valuable property, as well as the use of evidence at the criminal trial, or the latter question alone. Whether the motion is granted or denied, the court has either determined an independent proceeding or it has not. This mutuality, regardless of how the motion is decided, has been assumed by the courts. See *Carroll* v. *United States*, 354 U.S. 394, 405.[4]

In short, consistent with the contentions made in *Di Bella*, we believe that the government would not have been entitled to appeal if the defendant's motion had been made in the district of the indictment. But if we are wrong in *Di Bella* and orders deciding motions for return of this kind of property filed before indictment in the district of the indictment are appealable, *a fortiori* the order in this case is appealable. For here, as in *Di Bella*, the motion was brought after complaint but before indictment and was decided after indictment. In addition, the motion and order were, if anything, more independent of the prospective criminal case since they were in a district other than that where the trial would take place. As we indicate above, we know of no reason why the government should not be entitled to appeal the granting of a motion to suppress where the defendant could have appealed had the motion been denied.[5]

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[4] Of course, Congress may specifically provide for appeal by the government or by the defendant. It has allowed the government to appeal from orders granting motions to suppress in narcotics cases without allowing defendants to appeal from the denial of such motions. 18 U.S.C. 1404.

[5] The only exception, we believe, is if the effect of orders granting and denying motions to suppress is different, *i.e.*, one is *res judicata* as to the introduction of evidence at the criminal trial but the other is not (see *infra*, p. 35).

Accordingly, we turn next to the question whether the present case is distinguishable from *Di Bella* because the motion to suppress was not made in the district where the criminal case would be tried.

II

THE SAME STANDARD OF APPEALABILITY SHOULD BE APPLIED TO ORDERS ENTERED IN THE DISTRICT OF SEIZURE AND THE DISTRICT OF INDICTMENT AND TRIAL

A. THE "ESSENTIAL CHARACTER AND THE CIRCUMSTANCES" OF MOTIONS UNDER RULE 41(e) ARE THE SAME WHETHER THEY ARE BROUGHT IN THE DISTRICT OF INDICTMENT OR ANOTHER DISTRICT, AND THE SAME STANDARD OF APPEALABILITY SHOULD BE APPLIED

Although there are earlier dicta adopting purely mechanical rules as to appealability, such as whether the motion was brought before or after indictment and whether it was brought in the district of trial or another district,* the recent decisions of this Court indicate that the decisive considerations are the substantive purposes and effects of the proceeding, without regard to merely formal distinctions. Thus, in *United States* v. *Wallace Co.*, 336 U.S. 793, 802, the Court stated that "[w]hether a motion is to be treated as independent and plenary or as merely a procedural step in a pending trial must be determined by particular circumstances."

The basic philosophy of *Carroll* v. *United States*, 354 U.S. 394, is also inconsistent with any arbitrary

* The earlier opinions are discussed at pp. 25–30 below.

theory of appealability. That opinion emphasized strongly that fragmentary appeals are not favored. In addition, quoting from *Cogen* v. *United States, supra,* 278 U.S. at 225, the Court stated that the "'essential character and the circumstances under which it is made' determine whether a motion is an independent proceeding or merely a step in the criminal case" (354 U.S. at 404, note 17). Under this approach there is no room for distinguishing between motions made in the district where the trial will be held and motions made in another district where the evidence was seized. In both cases the essential character of the motion and the circumstances are the same.

If, as in *Di Bella,* a motion is filed prior to indictment seeking only the suppression of evidence, the only purpose, obviously, is to influence the outcome of a criminal prosecution or, possibly, a civil case. The order can have no other effect. This will be true wherever the motion is filed; it should make no difference, therefore, whether an indictment is subsequently returned in the district where the property was seized and the motion was made or in another district.

The same reasoning applies to motions prior to indictment seeking the return of property, as well as the suppression of evidence, where the property is clearly contraband or stolen, or where the issue of whether the property is contraband or stolen depends on the outcome of the criminal case. In either instance, the movant is not entitled to return of the property even if his claim under the Fourth Amendment is correct.

The real purpose of such a motion, either in the district of seizure or in the district of the indictment, is to prevent the use of the evidence at the trial. The district court's order, wherever it be made, decides merely whether the evidence can be used by the government either at the trial or to secure other evidence to be used at the trial.

There is equally little occasion for distinguishing according to the place of the motion in the converse situation. If the prospective defendant moves before indictment for the return of items in which he has a substantial property right, as well as for their suppression as evidence, he has an important interest in their immediate return if his claims under the Fourth Amendment are correct. Thus, as we explain in *Di Bella,* pp. 50–51, orders deciding such motions are appealable if the motions are made before indictment. Such a motion is independent of the prospective criminal case whether it is made in the district of trial or of seizure. In both situations, the district court's order adjudicates an important property right of the movants which is separate and apart from the criminal trial.

The principle is the same when the motion is filed after an indictment has been returned. The motion, under the holdings in *Cogen* and *Carroll,* is part of the proceeding in the criminal case and therefore an order deciding such a motion is not appealable. The reason is substantive, not formal: the relative importance of the criminal or return-of-property aspects of the motion are partly functions of the certainty and proximity of a criminal prosecution, so that once the in-

dictment has been returned the criminal aspects of the motion gain overriding importance. Under these circumstances it can hardly make any difference that the defendant chooses to file his motion in the district of seizure when the criminal case is already pending in another district.

There is no practical or legal bar to treating motions made in one district as part of a criminal case in another. The district courts, including those in different circuits, are all part of a single federal judicial system. The same basic substantive and procedural law applies in all districts. Rule 41(e) speaks of a "motion" to suppress in the district of seizure, which suggests that the proceeding is not automatically separate from the criminal case. In providing for motions to suppress in the district of seizure or of indictment, Rule 41(e) seems to be merely providing two forums for the same motion; it does not even suggest that the motion is legally different depending on which forum the movant happens to choose.

The integral relationship between motions in the district of seizure and the district of indictment is shown by the fact that district courts frequently transfer motions under Rule 41(e) from the district of seizure to the district of indictment. In this very case, a motion to suppress filed by a codefendant in the Eastern District of Texas, which was the district of seizure, was transferred to the Southern District of Ohio. And in *United States* v. *Lester*, 21 F.R.D. 39 (S.D. N.Y.), the district court held that a defendant did not have an absolute right to bring a motion to suppress evidence in the district of seizure. The court de-

clined to determine the motion, but allowed the defendant to move in the district of trial, which was in another circuit. The court reasoned that the issue was highly complicated, that it was interrelated with issues involved in the trial, and that since other property was seized in other districts, if the districts of seizure considered motions to suppress, it would result in duplicate hearings and, perhaps, in conflicting judgments. See also *United States* v. *Klapholz*, 230 F. 2d 494, 497 (C.A. 2), certiorari denied, 351 U.S. 924. The courts, when they transfer motions to suppress from the district of seizure to the district of indictment, do not purport to be deciding the rights of either the defendant or the government. Indeed, it is doubtful whether a transfer would be permissible, even though otherwise proper, if it resulted in the denial of a right as important as immediate appeal. Yet, it would be strange to allow immediate appeal of pretrial orders based on motions transferred to the district of indictment merely because they could have been appealed if decided in the district of seizure, when orders in the district of indictment, based on identical facts and identical motions, could not be appealed.

The close relationship between motions under Rule 41(e) in the district of seizure and of indictment is also shown by the fact that all, or certainly almost all, pre-indictment motions under Rule 41(e) are filed in the district of seizure. If they are filed in any other district, they are subject to dismissal for want of jurisdiction since Rule 41(e) provides only for motions in the district of seizure or of trial. But the

district of trial cannot be ascertained until the indictment is filed. When an indictment is returned in the district of seizure, it automatically becomes the district of indictment and trial. It is only then that the situation in *Di Bella* arises—*i.e.*, a motion filed before indictment in the district which becomes the district of the indictment. It would be incongruous to apply the principles of appealability we suggest in *Di Bella* to a motion in the district of seizure when this district subsequently became the district of the indictment and trial, while applying entirely different principles when the indictment is returned in another district. The character of the proceeding to suppress cannot sensibly be made to depend upon the subsequent and often adventitious selection of the district in which an indictment should be obtained.

The only factor which differentiates motions filed in the district of seizure from those filed in the district of trial is the number assigned to the motion. A motion in the district of seizure receives, of course, a number in that district, and it is therefore different from the number already assigned (if a complaint has been filed) or which will be assigned in the district of the indictment. Here, the motion to suppress was given the number "No. 1667–M Misc." by the Florida district court while the case was labelled "Crim. No. 7558" in the Southern District of Ohio. But this difference is obviously a purely formal distinction. It should have no importance in determining whether the order entered in Florida was appealable, since, regardless of numbers, the motion was an integral part of the criminal case. The difference in numbers is the incidental result of Rule 41(e), by which Con-

gress has allowed interlocutory proceedings to be brought in different parts of the federal judicial system.

B. THE CONTRARY EXPRESSIONS IN THE *COGEN AND CARROLL* DECISIONS ARE NOT CONCLUSIVE

Although we see no basis in principle for determining the appealability of an order granting or denying a motion to suppress according to whether the indictment was returned in the same district, the latter view is supported by statements in two opinions of this Court. In *Cogen* v. *United States*, 278 U.S. 221, the Court said that, where a motion to suppress is filed (*id.* at 225),

> its essential character and the circumstances under which it is made will determine whether it is an independent proceeding or merely a step in the trial of the criminal case. The independent character of the summary proceedings is clear, even where the motion is filed in a criminal case, * * * wherever the motion is filed before there is any indictment or information against the movant, * * * or wherever the criminal proceeding contemplated or pending is in another court, like the motion in *Dier* v. *Banton*, 262 U.S. 147 * * *.

In *Carroll* v. *United States*, 354 U.S. 394, the Court said (*id.* at 403–404):

> Earlier cases illustrated, sometimes without discussion, that under certain conditions orders for the suppression or return of illegally seized property are appealable at once, as where the motion is made *prior to indictment, or* in a *different district* from that in which the trial will occur * * * [citing *Dier* v. *Banton*]. In such

> cases, as appropriate, the Government as well as the moving person has been permitted to appeal from an adverse decision. [Emphasis in the original.]

In *Cogen* and *Carroll*, the issues actually before the Court were whether a defendant and the government respectively could appeal from orders deciding motions to suppress when the motions were made *after* indictment.[1]

In our brief in *Di Bella* v. *United States*—which involves the appealability of orders on motions brought before indictment in the district of trial—we have carefully analyzed the *Cogen* and *Carroll* cases and shown why, in our view, portions of the opinions purporting to summarize existing law should not now be followed. In *Cogen* and *Carroll*, as we have noted, the issues actually before the Court were whether a defendant and the government respectively could appeal from orders deciding motions to suppress when the motions were made *after* indictment. We submit that the above single-line descriptions of the law on issues which were not directly before this Court are not conclusive here, just as they should not be considered conclusive in *Di Bella*.

The same reasons which we have spelled out in *Di Bella* for not following the comparable brief state-

[1] Two courts of appeals have held that orders on motions made in the district of seizure are appealable. *United States* v. *Sineiro*, 190 F. 2d 397 (C.A. 3); *United States* v. *Klapholz*, 230 F. 2d 494 (C.A. 2), certiorari denied, 351 U.S. 924 (by implication). The former relied principally on the statement in *Cogen*, the latter on *Dier* v. *Banton*. Thus, their authority depends largely, as do the *Carroll* and *Cogen* statements, on the *Dier* case.

ments of the law of appealability in *Cogen* and *Carroll* exist in the present case. First, the principle disfavoring fragmentary and nonterminal appeals applies equally in both situations. This principle means that an order which is related to a civil or criminal case should not be appealable unless its independent nature and immediate importance are clear. As we have shown above (pp. 19–25), an order on a motion to suppress in the district of seizure is as closely related to the criminal case as if it had happened to be brought in the district of the indictment.

Second, the time for trying criminal cases will be extended if all orders made in districts other than the district of indictment are appealable. A defendant would be able to delay his trial simply by bringing a motion to suppress in the district of seizure, even after an indictment was returned in another district; the delay would last not only until the appeal was decided but pending action upon a petition for certiorari. Furthermore, to hold that if the motion in the district of seizure is denied, the defendant can appeal even though he could not have appealed if the motion had been filed in the district of the indictment would encourage defendants to bring motions in the district of seizure in order to obtain delay even though it was otherwise more convenient to move in the district of the indictment.

It is surely preferable, except where it would seriously inconvenience the prospective defendant, to hear motions under Rule 41(e) in the district where the criminal trial will occur so that all aspects of the same criminal case can be decided by the same

court. Rule 41(e) does not manifest any other purpose. The aim of the rule in allowing motions in the district of seizure seems to be to provide prospective defendants with an opportunity to secure the immediate return of property which may be of considerable importance to them—not to provide a truly alternative forum for an effort to suppress illegally obtained evidence. Unless there was a provision for filing a motion to return in the district of seizure, the prospective defendant would have no place to bring such a motion if the government delayed obtaining an indictment or did not obtain one at all, since in that instance there would be no district of trial. This construction is supported by the language of Rule 41(e) which seems to allow only motions seeking both return of the property and suppression, not just suppression alone, in the district of seizure; in contrast, it indicates that motions seeking only suppression of evidence must be brought in the district of trial. On the other hand, since Rule 41(e) does not limit the time within which a motion can be brought in the district of seizure to the period before an indictment has been returned, another purpose of the rule may be to provide defendants with an alternative forum for obtaining return of their property which may be significantly more convenient than the district of the indictment. In any event, there is no reason why motions should be encouraged in the district of seizure which in no way are based on the need or convenience of the defendant but which merely furnish opportunity for delay.

Third, *Cogen* and *Carroll* relied on three holdings of this Court for their statements that orders deciding

motions brought before indictment are appealable. In our brief in *Di Bella*, pp. 28–37, we show that these cases do not support that broad dictum. As to the issue involved here—whether all orders in districts other than the district of indictment are appealable—the statements in *Cogen* and *Carroll* rest entirely on this Court's decision in *Dier* v. *Banton*, 262 U.S. 147. There, an involuntary bankrupt had, in compliance with orders of a federal district court, turned his property, assets, account books, and records over to a court-appointed receiver. A state district attorney applied to the receiver for production of the books and papers before a state grand jury. The bankrupt applied for an injunction against both the district attorney and the receiver to prevent the records from being used against him before the grand jury, on the ground that such use would violate his Fourth and Fifth Amendment rights. The district court refused the injunction, and appeal was taken to this Court, which decided the matter upon the merits without discussing appealability.

The holding in *Dier* v. *Banton* as to appealability is merely implicit and it apparently did not receive consideration by the Court. In any event, we think that in *Dier* v. *Banton* the order was properly appealable. That case, unlike the present one, involved two separate sovereignties, not merely two different courts within the same judicial system. We have argued above (pp. 19–25) that a motion brought under Rule 41(e) in the district of seizure is in reality a part of the criminal trial and that the fortuitous fact that two different districts are involved makes no practical or

legal difference. On the other hand it is obvious that a motion to suppress in a federal court cannot be part of the criminal case in a state court. While a difference in courts should not make an order appealable, a difference in sovereignties should.

Fourth, even if *Dier* v. *Banton* were in point as to the issue involved in this case, we do not think that it should still be considered binding. It was decided in 1923, at approximately the same time as this Court decided the cases relied on in *Cogen* and *Carroll* for the proposition that all orders deciding motions brought before indictment are appealable. In our brief in *Di Bella*, pp. 37–40, we show that these cases, which arose when motions to suppress were first becoming common, should not now be considered binding. The courts were then generous in allowing appeals in order to settle the new procedures on motions to suppress and because of doubt whether the orders would be *res judicata*. Moreover, the absence of discussion of appealability in most of these earlier cases indicates that both the litigants and the courts were not fully aware of the problem.

Finally, again as we point out in our brief in *Di Bella*, pp. 40–43, 47 and at pp. 19–20 above, recent decisions of this Court strongly indicate that questions of appealability are no longer to be determined by purely mechanical rules as to appealability.

In sum, we conclude that, when judged by considerations apart from its effect under the doctrine of *res judicata*, the order of the district court should be held not to be appealable even though it was not made by the court in which defendant will be tried. But as

we discuss below (pp. 36–38), those considerations do not stand alone. If the order renders the admissibility of the evidence *res judicata*, the party adversely affected would have a right to appeal under the principle that orders are appealable which finally adjudicate an important right of a party to the litigation. *Cohen* v. *Beneficial Loan Corp.*, 337 U.S. 541; *Swift & Co.* v. *Compania Caribe*, 339 U.S. 684. Accordingly, we turn now to the latter question.

III

THE ORDER OF THE DISTRICT COURT WAS NOT APPEALABLE ON THE GROUND THAT IT RENDERED THE ADMISSIBILITY OF THE EVIDENCE *RES JUDICATA* AT PETITIONER'S TRIAL

This Court has not yet finally determined the precise extent to which the judge who presides at a criminal trial is bound by a pretrial order on the admissibility of challenged evidence entered in the same district court. In *Gouled* v. *United States*, 255 U.S. 298, 312–313, the Court held that "where, in the progress of a trial, it becomes probable that there has been an unconstitutional seizure of papers, it is the duty of the trial court to entertain an objection to their admission or a motion for their exclusion and to consider and decide the question as then presented, even where a motion to return the papers may have been denied before trial." While the motion to suppress had been filed subsequent to indictment—and therefore under this Court's subsequent decision in the *Cogen* case was not final—in *Gouled* the Court did not rely on this fact. Although the language in the *Gouled* opinion leaves undetermined the exact extent to which

the trial court must give weight to the pretrial order, it is clear that the pretrial order is not *res judicata*.[8]

The situation is much the same in the district courts and circuit courts of appeals: while it is not firmly established whether a trial court can, in the absence of new evidence or exceptional circumstances, refuse to follow a pretrial order in the district of the indictment, none of the decisions suggests that the admissibility of the evidence becomes *res judicata*. The prevailing view seems to be that the trial judge has a large measure of discretion, since he is the governor of the trial with control over the admission of evidence. *Gatewood* v. *United States*, 209 F. 2d 789, 793 (C.A. D.C.) (dictum that a pretrial order under Rule 41(e) is not binding); *Waldron* v. *United States*, 219 F. 2d 37, 41 (C.A. D.C.) (trial court, in its discretion, can reconsider an order under Rule 41(e)); cf. *Dictograph Products Co.* v. *Sonotone Corp.*, 230 F. 2d 131, 134–136 (C.A. 2) (reconsideration of a motion for summary judgment is at the discretion of the trial judge); see also *United States* v. *Jackson*, 149 F. Supp. 937, 938 (D. D.C.), reversed on other grounds, 250 F. 2d 772 (C.A. D.C.) (not clear if the trial court can reconsider an order under Rule 41(e) only on the basis of new evidence or even without it). But

[8] This Court has clearly indicated in other decisions that an interlocutory order on a pretrial motion is not *res judicata*. *Carroll* v. *United States*, *supra*, 354 U.S. at 404; *Cogen* v. *United States*, *supra*, 278 U.S. at 224; see also *United States* v. *Cefaratti*, 202 F. 2d 13 (C.A. D.C.), certiorari denied, 345 U.S. 907 (overruled on other grounds in the *Carroll* case). These decisions do not establish independently that all pretrial orders are not *res judicata*: rather, the decisions turn on the lack of finality of the particular order.

see *United States* v. *Wheeler*, 256 F. 2d 745 (C.A. 3), certiorari denied, 358 U.S. 873 (no reconsideration on rehearing of an order under Rule 41(e) in the absence of new evidence; the court did not decide if the trial court could reconsider the order without new evidence);[9] cf. *TCF Film Corp.* v. *Gourley*, 240 F. 2d 711 (C.A. 3) (no reconsideration of an order denying a motion to file an amended complaint except in exceptional circumstances)."[10] Those courts indicating that the trial court is bound unless there is new evidence or exceptional circumstances have based this requirement on the ground of comity, not *res judicata*: *e.g.*, "judges of co-ordinate jurisdiction sitting in the same court and in the same case should not overrule the decisions of each other" (*TCF Films* v. *Gourley, supra*, 240 F. 2d at 713). The fact that it appears to be well established that the trial court can reexamine a pretrial order on a motion to suppress if there is new evidence or exceptional cir-

[9] *Wheeler* forbade *pretrial* reconsideration of the order so as "to prevent shopping about by the defeated party for a judge more favorably disposed to whom a petition for reconsideration may be presented." 256 F. 2d at 748. The element of "judge shopping" is not presented, however, when the issue is raised *at the trial itself*. In such a situation, the trial judge "must conscientiously carry out his judicial function in a case over which he is presiding. He is not doing this if he permits what he believes to be a prior erroneous ruling to control the case." *Castner* v. *First National Bank of Anchorage*, 278 F. 2d 376, 380 (C.A. 9).

[10] Only one case, as far as we can ascertain, holds that a trial court is absolutely forbidden to reconsider a pretrial order under Rule 41(e). *United States* v. *Jennings*, 19 F.R.D. 311 (D. D.C.). The court of appeals affirmed, however, only after noting that no new evidence had been adduced on the issue at the trial and that the trial court had reconsidered the evidence on the point after the trial. 247 F. 2d 784, 785.

cumstances demonstrates that the pretrial order is not absolutely binding, *i.e.*, it is not *res judicata*. This means, at the least, that orders on motions to suppress in the same district are not *res judicata* if they are not appealable. Indeed, since the decisions do not rest on whether the order was final and appealable, it appears that even final orders which could be appealed are not absolutely binding on the trial court.[11]

The rule should be the same with respect to orders entered in the district of seizure instead of the district of trial. As we have shown in discussing the appealability of such orders (pp. 19–25), a motion under Rule 41(e) in the district of seizure bears essentially the same relationship to the criminal trial as such a motion in the district of trial. Under that principle, the law as to a pretrial motion in the district of the trial is directly applicable to the question whether an order in the district of seizure is *res judicata*.

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[11] The only exception is a practical one: If the court before trial grants the motion and orders return of the property to the defendant, the practical effect may be to bind the government at the trial. The government would not have the evidence to introduce, unless conceivably it subsequently recovered the property through a subpoena or search warrant. Cf. *United States* v. *Wallace Co.*, *supra*, 336 U.S. at 801. This situation can only arise, however, with regard to motions brought after indictment. Orders on pre-indictment motions seeking return of property to which the defendant has a substantial and unchallenged interest are, in our view (see *supra*, pp. 14–15), appealable by either the government or the defendant. If the trial court grants a pre-indictment motion seeking return of materials in which the defendant has an insubstantial property interest, it seems proper judicial administration for a district court merely to order suppression. In that way, it is possible for the trial court, on the basis of new evidence or any other proper reason, to reconsider the order; the defendant is not substantially injured since he has no important interest in immediate return of the property.

The only basis for a distinction between motions under Rule 41(e) brought in the district of seizure and those brought in the district of trial is a very literal reading of Rule 41(e) itself. Referring to a motion brought in the district of seizure, the Rule states that "[i]f the motion is granted the property shall be restored unless otherwise subject to lawful detention and it shall not be admissible in evidence at any hearing or trial." We do not believe, however, that this provision puts orders in the district of seizure beyond any possible reconsideration by the trial court. If it did, it would make *res judicata* only orders granting motions against the government, while orders denying motions would not bind the defendant. This would be an anomalous result since logically an order is neither more nor less final depending on whether it decides in favor of one party or the other (see *supra*, pp. 17–18). It is the general rule that *res judicata* applies equally to both parties to a litigation. If orders granting motions under Rule 41(e) were *res judicata*, this would mean that such orders were final and therefore appealable by the government (see *infra*, pp. 36–38), while prospective defendants would not be able to appeal when their motions were denied in identical circumstances.

Our reading of Rule 41(e) is confirmed by a subsequent provision in the Rule which, apparently referring to motions both in the district of seizure and of trial, says: "The motion shall be made before trial or hearing unless opportunity therefor did not exist or the defendant was not aware of the grounds of the motion, but the [trial] court in its discretion may entertain the motion at the trial or hearing." While

this could conceivably have been interpreted as allowing motions at the trial only if they had not been made and decided before trial, we have seen (pp. 31–33) that the courts have allowed reconsideration of pretrial motions at the trial.

The precise question whether an order on a motion to suppress in another district is absolutely binding on the trial court has been directly considered in only one case. In *United States* v. *Brewer*, 24 F.R.D. 129 (N.D. Ga.), the court held that the prior ruling must be followed by the trial court, but only "[i]n the absence of exceptional circumstances." Since the court cited the *Wheeler* case, as well as the *TCF Films* case, for this proposition, it seems clear that, by exceptional circumstances, it included new evidence (see *supra*, pp. 32–33). Thus, as we have indicated above, the court was in effect holding that the order of the district of seizure did not have a *res judicata* effect. Moreover, this decision, if it had held that orders in the district of seizure are *res judicata*, would have been overruled by the decision of the court of appeals below stating that the rule in the Fifth Circuit was to the contrary (R. 25–26).[11]

The arguments showing that an order on the motion to suppress is not sufficiently final to be appealable even when the district of seizure differs from the district of trial also go far to demonstrate that the order is not *res judicata*. Both questions turn upon the finality of the order. "Ordinarily the requirement

[11] We add that, in our view, the *Brewer* court was far too parsimonious in its statement of the circumstances under which the trial court could properly reconsider the earlier suppression order.

of finality of judgment as a basis for appellate proceedings is the same as that of finality as a basis for the application of the rules of *res judicata.*" Restatement of Judgments, Sec. 41, Comment *a.* See also *Merriam Co.* v. *Saalfield*, 241 U.S. 22, 28; *Smith* v. *McCool*, 16 Wall. 560, 561. This question was considered by this Court in *United States* v. *Wallace Co.*, *supra*, 336 U.S. 793. The district court, after indictment, ordered the suppression of certain documents as illegally seized, and their return to the defendants. Subsequently, the government brought a civil action and sought to subpoena the documents. In answer to the defendants' contention that the suppression order was *res judicata*, this Court applied the same standards in determining whether the order was *res judicata* as it would have if the issue had been whether the order was appealable (*id.* at 802):

> To some extent both phases of the contention—scope of the order and its appealability—depend upon whether the proceeding was handled by the court as an independent plenary proceeding or one to suppress evidence at a forthcoming trial. For a judgment in an independent plenary proceeding for return of property and its suppression as evidence is final and appealable and the scope of relief in such a case may extend far beyond its effect on a pending trial; but a decision on a motion to return or suppress evidence in a pending trial may be no more than a procedural step in a particular case and in such event the effect of the decision would not extend beyond that case. Whether a motion is to be treated as independent and plenary or as merely a procedural step in a pending trial must be determined by particular circumstances.

The Court concluded that the proceedings under Rule 41(e) were a part of the criminal proceedings and that therefore the "order does not stand as a bar to consideration of the availability of the documents for use as evidence in this civil case." *Id.* at 803. Similarly, in *Cogen* v. *United States, supra,* 278 U.S. at 224, and *Carroll* v. *United States, supra,* 354 U.S. at 404, the Court indicated that a nonappealable order on a motion to suppress evidence is not *res judicata.*

If there are differences between the degree of finality required for appeal and the degree required for application of the doctrine of *res judicata,* the greater finality is required in the latter case. It follows that an order may be appealable without being *res judicata,* but the converse proposition is not true. As we point out above, therefore (pp. 30–31), if the Court is of the opinion that the order of suppression would be *res judicata* in the present case, it should hold that the order was sufficiently final and separate from the criminal case to support an appeal.

In sum, we believe that the order below is not *res judicata* for two separate reasons: The order was not final; and, even if it had been final for purposes of appealability, it would not have been absolutely binding on the trial court. But, we again emphasize, if we are wrong in this contention and the order below is held to be *res judicata,* by the same token the order was necessarily final and not an integral part of the criminal case, and accordingly was appealable.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that the judgment of the court of appeals should be affirmed. If, however, this Court holds in *Di Bella,* No. 21, that the order there was appealable, or if the Court decides that the order of the district court below renders the legality of the seizure *res judicata,* it is respectfully submitted that the judgment below should be reversed and the appeal to the court of appeals from the order of the district court should be reinstated.

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